

them were done to effect the continued existence of the conspiracy, and to effect the object of the conspiracy, at that moment, criminal responsibility for the intents charged in this Sixth Count was consummated, by these acts or any of them done to effect the object of the conspiracy. Though certain acts were done by only one party this would bind each and every party to the conspiracy, and such act becomes the act of every party to the conspiracy.

"Now, evidence of the defendant's good character should be considered by you with the other evidence in the case, and may, in connection therewith, be sufficient to raise a reasonable doubt in your minds as to the defendant's guilt. Evidence of the defendant's good character is of the same category as other factual evidence, and must be considered by you in your deliberations, and may of itself be believed by you and create a reasonable doubt, where heretofore no reasonable doubt would exist.

"The defendants in this case, other than Dr. Mills, have pleaded nolo contendere, therefore are not being tried by you along with the defendant Mills. You are not to permit the fact that the other defendants have entered such a plea to have any connection; you are to consider only the charges for which he is now being tried before you.

"Now, I think that that is a sufficient discussion for the purposes of the evidence here. You are to weigh all the circumstances in evidence as to each count of the indictment—or the information—as you find it as they may apply, and reach a unanimous verdict. You understand all twelve of you must concur, and reach a unanimous verdict as to the guilt or innocence of the defendant. If you find he is guilty—after consideration and comparison of all of the evidence, if you find that the government has made out a case beyond and to the exclusion of a reasonable doubt as to one or more counts of the indictment—or the information—you say in your verdict: 'We, the Jury, find the defendant Roosevelt Mills guilty of the charge in count blank,' and specify which count of which you find him guilty.

"If the government has failed in its proof of any one or more of the counts of the information beyond a reasonable doubt, you find him not guilty, and you say in your verdict, 'We, the Jury, find the defendant Roosevelt Mills not guilty, so say we all.' And, as I say, your verdict must be unanimous. One of you must sign it as foreman, dated Jacksonville, Florida. You should select a foreman when you first go out, and let the foreman preside over your deliberations and sign the verdict.

"Are there any further objections, other than the objections in chambers, as to the charge?

"Are there any further objections you want to make?"

Mr. WALKER. "No, Your Honor."

Mr. ROTHSTEIN. "No, Your Honor."

The COURT. "Now, you are not concerned with the first three counts of this indictment. There's only four, five, and six——— it is an information; I keep calling that thing an indictment; it is an information signed by the United States Attorney. Take that, and the exhibits in.

"You may retire, then, for consideration of your verdict."

The jury having found the defendant, Roosevelt F. Mills, guilty on counts 4 and 5 involving the charge of aiding and abetting in the illegal sale of *sulfathiazole tablets* and *penicillin tablets* and not guilty on count 6 involving the charge of conspiracy to violate the laws of the United States, the court imposed a fine of \$300.

3842. Misbranding of Seconal Sodium capsules. U. S. v. Frank C. Tuma (Tuma Drugs). Motions for dismissal of information and for bill of particulars denied. Plea of guilty. Fine of \$300, plus costs. (F. D. C. No. 28104. Sample Nos. 42113-K to 42115-K, incl.)

INFORMATION FILED: January 17, 1950, Northern District of Illinois, against Frank C. Tuma, trading as Tuma Drugs, at Oak Park, Ill.

ALLEGED VIOLATION: On or about February 10, 14, and 23, 1949, while a number of *Seconal Sodium capsules* were being held for sale at Tuma Drugs after shipment in interstate commerce, the defendant caused a number of such

capsules to be repacked and sold without a physician's prescription, which acts resulted in the repackaged capsules of the drug being misbranded.

NATURE OF CHARGE: Misbranding, Section 502 (b) (2), the repackaged drug failed to bear a label containing a statement of the quantity of the contents.

Further misbranding, Section 502 (d), the repackaged drug contained a chemical derivative of barbituric acid, which derivative has been found to be, and by regulations designated as, habit forming; and the label of the drug failed to bear the name, and quantity or proportion of such derivative and in juxtaposition therewith the statement "Warning—May be habit forming."

Further misbranding, Section 502 (f) (1), the labeling of the repackaged drug failed to bear adequate directions for use.

DISPOSITION: On April 7, 1950, the defendant filed motions for dismissal of the information and for a bill of particulars, and on April 20, 1950, after consideration of the briefs of counsel, the court handed down the following decision:

The COURT: "I have read the briefs of the parties.

"This is a criminal action instituted by an Information charging the defendant with three separate violations of the Federal Food, Drug and Cosmetics Act.

"The Information is in three counts and charges that the defendant caused the misbranding of three distinct articles of drug while they were held for sale after shipment in interstate commerce.

"The first count charges that the defendant, 'on or about' February 14, 1949, caused the removal of a number of capsules of Seconal Sodium from a properly labeled bottle in which the drug had been shipped in interstate commerce and caused the capsules to be repackaged in a box which was sold to one William R. Price without a prescription.

"It further charges that the box in which the drug was repacked did not contain an accurate statement of the quantity of contents as required by the provisions of the Act (21 U. S. C. A. 352 (d) (2)); that it did not, as required by 21 U. S. C. A. 352 (d), bear the name and quantity or proportion of the derivative of barbituric acid, namely Seconal Sodium, of which the drug was composed, and it did not bear the statement 'Warning: May be habit forming'; and that it did not bear adequate directions for use as required by U. S. C. A. 352 (f) (1). It is alleged that causing the drug to be repacked in a box which did not bear the required labeling was an act which constituted a violation of 21 U. S. C. A. 331 (k).

"Counts II and III charge the defendant with similar violations of the Act which are alleged to have occurred on or about February 10, 1949, and February 23, 1949.

"The pertinent provisions of the Act are:

Section 331—

The following acts and the causing thereof are hereby prohibited: * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

Section 352—

A drug or device shall be deemed to be misbranded— * * *

(b) If in package form unless it bears a label containing * * *

(2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count.

Section 352—

A drug or device shall be deemed to be misbranded— * * *

(d) If it is for use by man and contains any quantity of * * * barbituric acid * * *; or any chemical derivative of such substance, which derivative has been by the Administrator, after investigation, found

to be, and by regulations designated as, habit forming; unless its label bears the name, and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement "Warning: May be habit forming."

Section 352—

A drug or device shall be deemed to be misbranded— * * *

(f) Unless its labeling bears (1) adequate directions for use.

"Defendant now moves in the alternative (1) to dismiss (2) for a bill of particulars.

"Defendant urges fifteen grounds for dismissal of the information:

"Grounds 1, 2, 3, 4—That the information and each count thereof is 'vague, indefinite and entirely insufficient to apprise the defendant of the charge which he is called upon to meet.'

"Grounds 5, 6, 9, 13, 14—That the language of the information in regard to the times of manufacture of the drugs, the times of interstate shipment and the times of intrastate transactions involving the drugs are also vague and indefinite and do not give the defendant sufficient information regarding the interstate shipments so as to allow him to prepare his defense.

"Grounds 7, 8, 10, 15—That the allegations to the effect that the defendant 'caused' certain actions to take place are vague and unsufficient to apprise the defendant of the charge he is called upon to meet.

"Ground 11—That the repackaging and selling of the capsules without a physician's prescription are immaterial, since they do not constitute a violation of any federal statute or regulation.

"Ground 12—That Count II is defective in that it fails to set forth the original label which accompanied the drug in interstate commerce.

"The Motion for a Bill of Particulars, the alternative motion, concerns itself with the following information: The dates of interstate shipment by the manufacturer; the dates of purchase by defendant; what acts were performed by defendant whereby he caused the drug to be repackaged and sold; whether defendant performed any acts personally in repackaging and selling; and, in regard to Count II, the legend printed on the label of container in which the drugs were shipped either to defendant or an intermediary.

"With reference to the motion to dismiss the information I am of the opinion it should be denied.

"All of the essential elements which are the gravamen of the crime are set forth with considerable particularity in the information, that is, the shipment of a drug in interstate commerce, and the subsequent disposal and misbranding of that drug. The essential allegation here is the fact of interstate shipment rather than when it was shipped. The Act is operative regardless of the length of time intervening between the shipment and the misbranding. In this regard I direct counsel's attention to the case of *United States v. Sullivan*, 332 U. S. 689.

"The allegations to the effect that the defendant 'caused' certain actions to take place is sufficient in the face of a motion to dismiss. As a matter of fact, these allegations are in precise language of the statute itself and I direct counsel's attention to Section 331.

"The fact that the legend of the original label is not set forth in Count II does not constitute a fatal defect. The language of that label is merely an evidentiary fact and is not an essential element of the crime nor does it prevent the defendant from preparing his case.

"As to the alternative motion for a bill of particulars, I am of the opinion that also should be denied.

"All the information sought in the bill is evidentiary in nature and has no reference to the defendant's ability to prepare his defense properly. No rule of criminal procedure requires that the prosecution lay bare its entire case to the defendant insofar as the evidentiary facts are concerned.

"Granting this motion would require the prosecution to do just that. Accordingly, both motions are hereby denied."

On May 23, 1950, the defendant entered a plea of guilty and the court fined him \$300, plus costs.